

Overview

A backlash against civil rights gains such as affirmative action programs marked the political landscape during the mid-1990s. The passage of Proposition 209 by California voters in 1996—perhaps the most prominent attack on affirmative action during the decade—was followed by a series of similar measures in other states, including Michigan, Washington, and Texas. In campaigning for these policy reversals of affirmative action, right-wing groups managed to take the term “racial discrimination” out of its civil rights context and redefine it to include “reverse racism”—a supposed threat to whites posed by affirmative action. A clear example is the appropriation of civil rights rhetoric such as Martin Luther King’s vision that people “will not be judged by the color of their skin but by the content of their character” as an ideological weapon against affirmative action programs. The text of Prop 209 did not include an outright ban on “affirmative action.” Instead, it bans “discrimination and preferential treatment,” which was commonly interpreted to include affirmative action programs. This struggle over language and definitions has critical implications for racial justice policies, and there was a need to legally define what is actually meant by “racial discrimination.”

The Policy

On August 9, 2003, Governor Davis signed Assembly Bill 703, “An act to add Section 8315 to the Government Code, relating to racial discrimination.” Key aspects include:

- The definition of “racial discrimination” to be used was that of the United Nations International Convention for the Elimination of All Forms of Racial Discrimination (CERD), adopted by the U.N. General Assembly in 1965 and signed by the United States in 1966.
- The CERD definition allows for the use of “special measures securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection” and says that these “special measures” (e.g., affirmative action) cannot be considered racial discrimination.¹
- AB 703 specifies that the state is *not* required “to prove racial discrimination before undertaking [such] special measures,” thereby focusing on outcomes rather than any intent to discriminate.

Impact

The bill provides a legal basis for a challenge of any state agency’s decision to abandon affirmative action since the passage of Proposition 209. AB 703 makes it clear that affirmative action programs are not to be considered “discrimination and preferential treatment.”

¹ International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, entered January 4, 1969. Posted at: http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

After the passage of Proposition 209, the heads of state agencies and the chancellors of the state's universities could determine for themselves whether the initiative's ban of "discrimination and preferential treatment" meant that affirmative action programs were now illegal. While AB 703 does not provide a blanket reversal of the decisions made by individual heads of state agencies to abandon affirmative action, its language does give grounds for legal challenges to these decisions.

In the year since the bill was signed into law, there is some evidence of its usefulness. In a suit filed by the conservative Pacific Legal Foundation attacking Berkeley Unified School District's use of race in its diversity policy, an Alameda County Superior Court used AB 703's definition to dismiss the claim.

Key Players

State Assemblyman Mervyn Dymally, a progressive African American representing Compton, introduced the bill. It was brought to the legislator by the Black Faculty Association, whose chairman, California State University Professor Dr. J. Owen Smith, was key in drafting the text. Civil rights groups such as the Mexican American Legal Defense and Education Fund (MALDEF) and the NAACP supported the bill, as did the Association of Black Personnel in City Government and some state agencies, including the East Bay Municipal Utility District and the Port of Oakland.

Winning the Policy

Although the potential impact of AB 703 is significant, it seems to have passed with very little attention from legislators, media, or groups from any part of the political spectrum. This stands in direct contrast with the national media attention and intense political mobilization around Proposition 209, which sought to ban affirmative action in 1996. There was little to no grassroots mobilization surrounding AB 703, and Assemblyman Dymally's office concedes that there was not much campaign work, and "there was not a ready-made support mechanism" for the bill.²

The bill was opposed by the Pacific Legal Foundation, the conservative group that filed suit against Berkeley's school diversity policy, and conservative ideologues such as Ward Connerly, the notorious author of Proposition 209. Despite their efforts, they were not able to mobilize conservative groups against the bill in any meaningful way.

Upon the passage of the bill, Dymally's office notified the heads of state agencies and chancellors of the state universities that the bill clarified that affirmative action programs are now legally accepted.

Challenges

Since AB 703 essentially provides a legal hook to resurrect affirmative action programs that were eliminated because of Proposition 209, it may be too soon to measure its effectiveness because legal actions tend to be protracted battles. Any weaknesses of the bill may be revealed in court challenges, although civil rights and progressive organizations have not been proactively seeking legal cases to utilize the tools provided by AB 703. Ward Connerly did file a suit against

² Tamara Warren Mitchell, aide to Assemblyman Mervyn Dymally, Phone Interview, July 1, 2004.

the constitutionality of the bill, but the judge ruled that Connerly did not have grounds to bring the suit and dismissed the case.

Proposition 209 and the sibling initiatives it spawned across the nation were much more than legal changes to the approach taken by governments against racial discrimination. They were cornerstones in a marked rightward shift in the popular consciousness against affirmative action, other measures designed to attack racial inequity, and the society's larger understanding of the current status of racial disparities. Although AB 703 provides a legal handle to challenge some of the post-209 policy implications, a lack of significant attention paid to the bill has meant that public attitudes about racial inequity and affirmative action have not been influenced, and the bill has not yet made an impact on the political environment in the way that Prop 209 did.

Replicability

There is clear potential to replicate AB 703 in other states where affirmative action has been or is currently being challenged, especially where the political terrain is being contested by opposing sides that both use the language and rhetoric of "racial discrimination." Assemblyman Dymally sent information about the bill and its text to state legislators in Michigan to consider implementing a similar measure there.